

DISTRICT OF COLUMBIA
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A.S.P., INC.

Appellant/Employer

v.

R.V.R.

Appellee/Claimant

And

DISTRICT OF COLUMBIA DEPARTMENT OF
EMPLOYMENT SERVICES

Appellee/Agency

Case No.: ES-P-08-109534

FINAL ORDER

I. INTRODUCTION

This is an appeal by Appellant/Employer A.S.P., Inc. of a Claims Examiner's Determination served February 7, 2008, holding Appellee/Claimant R.V.R. eligible for unemployment benefits because she was laid off for lack of work. This appeal raises the issue whether Claimant, in any week, was "unemployed" as defined in the District of Columbia Unemployment Compensation Act. D.C. Code, 2001 Ed. § 51-101(5).

This administrative court issued a Scheduling Order and Notice of In-Person Hearing on February 21, 2008, scheduling the hearing for March 6, 2008, at 1:30 p.m. J.R., Director of Human Resources, represented Employer, and with M.P., Program Manager, testified on

Employer's behalf. Claimant appeared and testified on her own behalf. No one representing Appellee/Agency District of Columbia Department of Employment Services ("DOES") appeared for the hearing.¹ During the hearing, I admitted into evidence Employer's exhibit 100 and Claimant's exhibit 200. I relied on court records marked as exhibits 300 and 301 to determine jurisdiction.

II. FINDINGS OF FACT

1. The Claims Examiner's Determination was mailed to the parties on February 7, 2008. Claimant was found eligible for unemployment compensation benefits. On February 15, 2008, Employer appealed the Determination.

2. Claimant is a unionized, armed security guard for Employer and works on a contract Employer has with the General Services Administration. Claimant initially had a guaranteed work schedule of 40 hours per week, Monday through Friday. On January 17, 18 and 21, 2008, Claimant was suspended as a result of a heated argument she had with a colleague. After returning from suspension, Employer removed Claimant from a schedule that guaranteed 40 hours per week and placed Claimant on an "on-call" schedule. Being on-call means that Claimant is only given hours if a post is available, Employer chooses to ask Claimant to fill the vacancy, and Claimant is able to fill the time slot. This schedule does not guarantee a specific number of hours per week.

3. During the bi-weekly pay period ending February 3, 2008, Claimant worked 44.5 hours; during the bi-weekly pay period ending February 17, 2008, Claimant worked 63 hours;

¹ The Scheduling Order and Notice of In-Person Hearing was mailed to the Department of Employment Services at the address routinely used by this administrative court. The Scheduling Order was not returned by the post office. The Department of Employment Services did not request a postponement of the hearing.

and during bi-weekly pay period ending March 2, 2008, Claimant worked 53 hours. Exhibit 100. As of Thursday, March 6, 2008, Claimant had not received any work hours for the week of March 3, 2008. During the seven week period (from when Claimant began working an on-call schedule to the date of the hearing), Claimant has reported the wages she has earned to DOES. Based on the wage data submitted by Claimant, DOES has only issued her unemployment benefits for one week (Claimant could not recall for which work week). Claimant has filed a union grievance over the change in her work schedule.

III. DISCUSSION AND CONCLUSIONS OF LAW

In accordance with D.C. Code, 2001 Ed. § 51-111(b), any party may file an appeal from a Claims Examiner's Determination within ten calendar days after the mailing of the Determination to the party's last-known address or, in the absence of such mailing, within ten calendar days of actual delivery of the Determination. The Determination in this case was dated February 7, 2008. Employer's appeal was filed with this administrative court on February 15, 2008. The appeal was timely filed and jurisdiction is established. D.C. Code, 2001 Ed. § 51-111(b).

Generally, any unemployed individual who meets certain statutory eligibility requirements is qualified to receive benefits. D.C. Code, 2001 Ed. § 51-109. The law, however, creates disqualification exceptions to the general rule of eligibility. The burden is on the employer to establish an exception for an employee who would otherwise be eligible for unemployment insurance benefits under D.C. Code, 2001 Ed. § 51-109. However, the Claimant has the burden to demonstrate that she meets the eligibility requirements, both as an initial matter and in subsequent appeals. *Cumming v. District Unemployment Comp. Bd.*, 382 A.2d 1010,

1015 (D.C. 1978); *Woodward & Lothrop, Inc. v. D.C. Unemployment Comp. Bd.*, 392 F.2d 479, 482 (D.C. Cir. 1968).

Both Employer and Claimant agree that, contrary to the conclusion of the Claims Examiner, Claimant had not been laid off for lack of work. Rather, Claimant had been transferred from a work schedule that guaranteed 40 hours per week to an on-call schedule, which does not guarantee a minimum number of hours per week. During the seven weeks in January, February and March 2008, that Claimant has been on the on-call schedule, Claimant has worked less than 40 hours in each of the weeks in question. Exhibit 100.

These facts raise the question of whether Claimant was/is “unemployed” as defined by D.C. Code, 2001 Ed. § 51-101(5). Claimant’s testimony established that she was placed on a schedule that did not guarantee a 40-hour work week and that she has never worked 40 hours per week during the last seven weeks. Employer produced documentary evidence that confirms Claimant’s contention that she has worked less than 40 hours per week since being placed on the on-call schedule. Exhibit 100. D.C. Code, 2001 Ed. § 51-101(5) defines “unemployed” as:

An individual shall be deemed 'unemployed' with respect to any week during which he performs no service and with respect to which no earnings are payable to him, or with respect to any week of less than full-time work if 80% of the earnings payable to him with respect to such week are less than his weekly benefit amount plus \$20.

Neither Claimant’s weekly benefit amount, nor weekly wages earned were put into evidence during the hearing. In the absence of this evidence, I cannot determine whether Claimant was “unemployed” during any week for which she may have claimed benefits since she was performing services and being paid virtually every week. However, Claimant is reporting

her wages to DOES, which has assessed her eligibility for each week and ruled accordingly. Claimant has not challenged DOES's prior weekly eligibility assessments. I affirm the Claims Examiner's Determination that Claimant is eligible for unemployment because of her reduced work schedule. Claimant is eligible for benefits so long as she meets the legal definition of "unemployed" and reports her wages earned to DOES, so that it can determine whether Claimant is eligible during any period for which she claims benefits.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 13th day of March 2008

ORDERED, that the Determination of the Claims Examiner that Appellee/Claimant R.V.R. is eligible for unemployment compensation benefits due to her reduced work schedule is **AFFIRMED**, and it is further

ORDERED, that Appellee/Claimant R.V.R. remains **ELIGIBLE** so long as she meets the legal definition of "unemployed" and reports her earnings to DOES to determine if she is entitled to benefits for any particular week; and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

March 13, 2008

_____/SS/
Jesse P. Goode
Administrative Law Judge